U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 6 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the employment-based immigrant visa petition and dismissed the subsequent motion to reopen and motion to reconsider on September 6, 2012. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer and software development company. It seeks to employ the beneficiary permanently in the United States as a business systems analyst, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification and requested evidence in a Request for Evidence (RFE) dated March 30, 2012 demonstrating that the beneficiary meets the minimum level of education required by the labor certification. However, the director concluded that the petitioner's response to the RFE was untimely and denied the petition accordingly. The director subsequently dismissed the petitioner's motion to reopen and reconsider.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

On appeal, the petitioner, through its counsel, asserts that it has the continuing ability to pay the proffered wage as of the priority date onward and that the beneficiary possesses an advanced degree as required by the labor certification. The petitioner submits additional evidence, including a credential evaluation and financial documents for consideration on appeal.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

1977). The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification, was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on June 28, 2011.[2] The Immigrant Petition for Alien Worker (Form I-140) was filed on January 23, 2012.

The AAO will first address the petitioner's continuing ability to pay the proffered wage as of the priority date onwards. The proffered wage as stated on the Form ETA 9089 is $68,349 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.

In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

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[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

The evidence in the record indicates that the beneficiary has been working for the petitioner since April 2011. The beneficiary's Internal Revenue Service (IRS) Forms W-2 for 2011 and 2012 reflect that the petitioner paid the beneficiary $69,360 and $99,199 respectively. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage of $68,349 as of the priority date onward.[3]

The AAO will next discuss whether the beneficiary had the qualifications stated on the labor certification as of the priority date. At the outset, however, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[4] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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[3] The AAO notes that in accordance with 8 C.F.R. § 204.5(g)(2), the petitioner submitted its audited financial statement for 2011 and indicated that its 2012 financial statement could not be ready until September 16, 2013.

[4] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

. . .

> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, revisited this issue in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984), stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). (*See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On the ETA Form 9089, the "job offer" position description for business systems analyst provides:

> Conduct organizational studies, evaluations, design systems, and procedures, conduct work simplifications and measurement studies and prepare operations and procedure manuals to assist management in operating more efficiently and effectively. Configure business applications, design and implement solutions.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: "Master's"

H.4-B. Major Field Study: "math, science, or related"

H.6. Is experience in the job offered required for the job?

The petitioner checked "no" to this question.

H.7. Is there an alternate field of study that is acceptable?

The petitioner checked "no" to this question.

H.8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

H.9. Is a foreign educational equivalent acceptable?

The petitioner checked "yes" that a foreign educational equivalent would be accepted.

H.10. Is experience in an alternative occupation acceptable?

The petitioner checked "no" to this question.

H.14. Specific skills or other requirement.

The petitioner left this section blank.

On the ETA Form 9089, signed by the beneficiary on November 5, 2011, he indicated that the highest level of achieved education related to the requested occupation was a Master's degree in business and information technology. He listed the institution of study where that education was obtained as ' ' in Dublin, Ireland, and the year completed as 2003. In support of the beneficiary's educational qualifications, the petitioner submitted a copy of a certificate that reflects "Master of Science degree in Electronic Commerce (Business)" conferred by . This document is undated and therefore, it does not indicate when the degree was awarded to the beneficiary. The petitioner also submitted "Statement of Examination Results" from dated September 11, 2003, which reflects the beneficiary's grades for "Year 1 of the MSc in Electronic Commerce (Business)."

The record also contains copies of the beneficiary's transcripts and "Graduate Diploma in Business Studies in Information Technology," dated July 10, 2002 from ; copies of "Consolidated Marks Memorandum" and a certificate of "Bachelor of Science (3 year degree course)," dated July 14, 2000 from , Hyderabad, India; copies of "Memorandum of Marks" and a certificate of diploma from dated July 31, 1993, reflecting that the beneficiary completed the requirements of the "3-Year full-time Diploma Course of Study" at and was awarded Diploma in "Electrical & Electronics Engineering;" copies of the beneficiary's secondary education documentation; and copies of various training certificates in computer software courses that the beneficiary completed between 1997 and 1999.

The petitioner submits an evaluation, dated July 6, 2012, from Executive Vice President-Registrar from states that the beneficiary has attained a level of education at least equivalent to a Bachelor's Degree before entering into the Master's program. further notes that although a Master's degree is normally conducted in two years in the United States, many accredited universities also offer one-year Master's degree programs, and concludes that the Master Program's which the beneficiary attended is equivalent to an U.S. Master's degree conducted by many universities in the United States. An additional evaluation from of , dated August 6, 2005, states that the beneficiary's international courses work, certifications, and employment experience are comparable to a U.S. Regionally Accredited Master of Science Degree in Information Technology.

On May 14, 2013, the AAO issued a Request for Evidence and Notice of Intent to Dismiss (RFE/NOID), informing the petitioner that according to information found on the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), a master's degree in Ireland is awarded after completion of two years of graduate study and defense of a thesis, and is comparable to a master's degree in the United States. The AAO stated that the beneficiary's academic record at Dublin City University (DCU) was incomplete and requested evidence demonstrating the beneficiary's second year of studies at DCU and defense of a thesis. In addition, the AAO stated that any additional credentials evaluation submitted in response should specifically address the conclusions of EDGE. The AAO also requested evidence demonstrating the petitioner's continuing ability to pay the proffered wage on the priority date and onward.

Regarding the AAO's reliance on reports provided by EDGE, a federal district court in *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were comparable to a U.S. bachelor's degree. Another federal court in *Sunshine Rehab Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by the AACRAO to support its decision.

According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx (accessed on May 23, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php (accessed on May 23, 2013).

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

On appeal,[5] counsel provides a list of some of the universities in the United States that offer one-year Master's degree programs. Counsel asserts that the fact that the diploma program at requires a bachelor's degree for admission means that the diploma itself is equivalent to a U.S. bachelor's degree. Counsel further asserts that the one-year U.S. master's programs are conducted in the same way as the beneficiary's master's program at , and therefore, it is equivalent to a U.S. master's program.

In response to the AAO's RFE/NOID, the petitioner submits a credentials evaluation from AACRAO,[6] dated September 10, 2012, stating that the beneficiary's Master of Science degree from is comparable to a one-year Master's degree from a U.S. college or university. Counsel asserts that according to this evaluation, the beneficiary has attained a level of education equivalent to a Master's degree in the United States.

The AAO notes that for this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area

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[5] The brief accompanying the Form I-290B, Notice of Appeal or Motion, is titled "Motion to Reopen / and Reconsideration;" However, because counsel checked the appeal box on the Form I-290B, the AAO will consider the brief as an appeal brief.

[6] The AAO notes that the evaluation from AACRAO was not signed; therefore, we cannot determine the qualifications of the evaluator. Any future evaluations submitted by the petitioner should identify the evaluator by name and include his or her credentials.

of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification.

The AAO first notes that the credentials evaluation from AACRAO, which the petitioner submitted in response to the AAO's RFE/NOID, does not specifically address the conclusions of EDGE, AACRAO's own database. On the evaluation, "Master's degree" is checked to item 14, which states "[a]pplicant has completed comparable level of U.S. education as indicated." The general comments on the evaluation states that "[t]he Master of Science from Ireland, represent a one-year graduate-level program in electronic commerce (business). It is comparable to a one-year master's degree from a regionally-accredited college or university in the United States." However, the evaluation does not indicate how the evaluator arrived to his or her conclusion. The AACRAO evaluation submitted by the petitioner is inconsistent with the conclusions of EDGE and does not address the fact that the beneficiary's education in does not reflect the second-year master's level coursework and a defense of thesis, which are identified as elements to satisfy the Master of Science degree requirements in Ireland.

Moreover, the record contains no evidence that the Master of Science program offered by was a one-year master's program at the time the beneficiary attended. The notation on "Statement of Examination Results" reflects that the grades the beneficiary received were for the "Year 1" of the master's program, which leads us to believe that the program had the second year coursework.

In addition, while the evaluations from AACRAO and indicate that the beneficiary's master's degree from was awarded in 2003, the evaluation from indicates the master's degree was awarded in 2002. Furthermore, the AAO notes that the beneficiary's master's degree certificate from does not indicate the date on which the degree was conferred. The record does not resolve the inconsistencies concerning the date of the beneficiary's degree from It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592. (BIA 1988).

The AAO also notes that on the labor certification, the beneficiary indicated "business and information technology" as the major field of his master's degree. However, the degree certificate from indicates that the master's degree was in "electronic commerce (business)." The petitioner submitted no evidence resolving the inconsistency between the major field of study on the labor certification and the major indicated on the degree certificate; and that these two different majors in fact are the same degree programs. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the

remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. at 591. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner has not overcome the conclusion reached, based on the report provided on EDGE, that the beneficiary's Master's degree from is not an equivalent degree to a U.S. Master's degree. The AAO concludes that the petitioner has not established that the beneficiary possesses a U.S. Master's degree or an equivalent foreign degree in science, math, or related field. Therefore, the petitioner has failed to demonstrate that the beneficiary qualifies for classification pursuant to section 203(b)(2) of the Act. [7]

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

[7] The regulation at 8 C.F.R. § 204.5(k)(2) states in part: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." Here, the Form ETA 9089 does not provide a combination of education and experience as an alternative to master's degree. Therefore, the AAO will not consider whether the beneficiary's foreign degrees are equivalent to a U.S. bachelor's degree and whether the beneficiary has five years of progressive experience in the specialty.